

1  
2  
3  
4  
5 UNITED STATES DISTRICT COURT  
6 DISTRICT OF NEVADA  
7

8 ALVON SHONEER SURRELL, SR.,

9 Plaintiff,

10 v.

11 STATE OF NEVADA, *et. al.*,

12 Defendants.

\* \* \*

Case No. 3:17-cv-00482-MMD-VPC

ORDER ACCEPTING AND ADOPTING  
REPORT AND RECOMMENDATION  
OF MAGISTRATE JUDGE  
VALERIE P. COOKE

13 Before the Court is the Report and Recommendation of United States Magistrate  
14 Judge Valerie P. Cooke (ECF No. 6) ("R&R") relating to Plaintiff's application to proceed  
15 *in forma pauperis* ("IFP") (ECF No. 1) and *pro se* complaint (ECF No. 1-1). The Court  
16 has reviewed Plaintiff's objection to the R&R. (ECF No. 7.) For the reasons discussed  
17 herein, the Court overrules Plaintiff's objection and adopts the R&R.

18 This Court "may accept, reject, or modify, in whole or in part, the findings or  
19 recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1). Where a party  
20 timely objects to a magistrate judge's report and recommendation, then the court is  
21 required to "make a *de novo* determination of those portions of the [report and  
22 recommendation] to which objection is made." 28 U.S.C. § 636(b)(1). Where a party fails  
23 to object, however, the court is not required to conduct "any review at all . . . of any issue  
24 that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149 (1985).  
25 Indeed, the Ninth Circuit has recognized that a district court is not required to review a  
26 magistrate judge's report and recommendation where no objections have been filed. See  
27 *United States v. Reyna-Tapia*, 328 F.3d 1114, 1123 (9th Cir. 2003) (disregarding the  
28 standard of review employed by the district court when reviewing a report and

1 recommendation to which no objections were made); see also *Schmidt v. Johnstone*,  
2 263 F. Supp. 2d 1219, 1226 (D. Ariz. 2003) (reading the Ninth Circuit's decision in  
3 *Reyna-Tapia* as adopting the view that district courts are not required to review "any  
4 issue that is not the subject of an objection."). Thus, if there is no objection to a  
5 magistrate judge's recommendation, then the court may accept the recommendation  
6 without review. See, e.g., *Johnstone*, 263 F. Supp. 2d at 1226 (accepting, without  
7 review, a magistrate judge's recommendation to which no objection was filed).

8 The R&R recommends granting the IFP. (ECF No. 6 at 1.) Plaintiff does not  
9 object. The Court will adopt the R&R's recommendation and will grant Plaintiff's IFP.

10 The R&R recommends dismissing claims against the State of Nevada and  
11 Washoe County because the State of Nevada cannot be sued under 42 U.S.C. § 1983,  
12 and claims against Washoe County because there are no allegations that Plaintiff  
13 suffered constitutional deprivation as a result of Washoe County's policy or custom. (*Id.*  
14 at 4-5.) Plaintiff does not appear to object. Nevertheless, the Court agrees with Judge  
15 Cooke.

16 Finally, the R&R recommends dismissing (1) the claims in Counts I and II based  
17 primarily on the alleged wrongful conduct of Plaintiff's defense counsel—deputy public  
18 defender Jessica Longley—in connection with her representation of Plaintiff in two  
19 criminal cases; and (2) the claims in Count III relating to (a) a search conducted in  
20 violation of the Fourth Amendment, (b) retaliation in violation of the First Amendment  
21 with leave to amend and (c) denial of the right of access to courts in violation of the First  
22 Amendment with leave to amend. (*Id.* at 5-9.) Judge Cooke found that the claims in  
23 Counts I and II are barred under *Heck v. Humphrey*, 512 U.S. 477 (1994), and, even  
24 assuming one of the criminal cases has not concluded,<sup>1</sup> the Court should abstain to  
25 avoid interfering with the state prosecution. (*Id.* at 5-6.)

26 ///

---

27 <sup>1</sup>Based on the docket for case number CR16-1240, the case has not concluded.  
28 See <https://www.washoecourts.com/Query/CaseInformation/CR16-1240> (last accessed  
July 17, 2018).

1 In *Heck*, the Supreme Court held that “in order to recover damages for [an]  
2 allegedly unconstitutional conviction or imprisonment, or for other harm caused by  
3 actions whose unlawfulness would render a conviction or sentence invalid, a § 1983  
4 plaintiff must prove that the conviction or sentence has been reversed on direct appeal,  
5 expunged by executive order, declared invalid by a state tribunal authorized to make  
6 such determination, or called into question by a federal court’s issuance of a writ of  
7 habeas corpus, 28 U.S.C. § 2254.” *Id.* at 486-87. “A claim for damages bearing that  
8 relationship to a conviction or sentence that has not been . . . invalidated is not  
9 cognizable under § 1983.” *Id.* at 487. Moreover, the *Heck* doctrine applies to cases  
10 where criminal charges are pending. *Harvey v. Waldron*,  
11 210 F.3d 1008, 1015 (9th Cir. 2000) (“a § 1983 Fourth Amendment claim alleging illegal  
12 search and seizure does not accrue under *Heck* until the criminal charges have been  
13 dismissed”), *overruled in part on other grounds by Wallace v. Kato*, 549 U.S. 384, 393-  
14 394 (2007).

15 Plaintiff’s objection contends that he has stated claims against Longley and  
16 focused again on her alleged wrongful conduct. However, the Court agrees with Judge  
17 Cooke that claims against Longley cannot proceed under *Heck* unless the underlying  
18 conviction in case number CR16-1245 has been set aside. To the extent Plaintiff’s  
19 claims are based on Longley’s alleged conduct in the on-going criminal case—CR 16-  
20 1240—*Heck* applies to bar Plaintiff’s claims while the criminal charges are pending.

21 Plaintiff also argues why he has stated a claim in Count III. Again, the Court  
22 agrees with Judge Cooke that his allegations fail to state a claim.

23 It is therefore ordered that the Report and Recommendation of Magistrate Judge  
24 Valerie P. Cooke (ECF No. 6) is accepted and adopted in its entirety.

25 It is further ordered that Plaintiff’s application to proceed *in forma pauperis* (ECF  
26 No. 1) is granted. Pursuant to 28 U.S.C. § 1915(b)(2), the Sacramento County Jail must  
27 pay to the Clerk of the United States District Court, District of Nevada, 20% of the  
28 preceding month’s deposits from the account of Alvon Surrell, # 3955853 (in months that

1 the account exceeds \$10.00) until the full \$350.00 filing fee had been paid for this action.  
2 If plaintiff should be transferred to another correctional facility, the Sacramento County  
3 Jail Accounting Supervisor (or its equivalent) must send a copy of this order to the new  
4 facility indicating the amount that Plaintiff has paid towards his filing fee, so that funds  
5 may continue to be deducted from Plaintiff's account. The Clerk is directed to send a  
6 copy of this order to the Jail Accounting Supervisory (or its equivalent) at Sacramento  
7 County Jail, 651 I Street, Sacramento, CA 95814.

8 It is further ordered that the Clerk file Plaintiff's complaint (ECF No. 1-1.)

9 It is further ordered that claims against the State of Nevada and the claims for  
10 damages against Nevada Attorney General in his official capacity be dismissed with  
11 prejudice. The claims in Counts I and II are dismissed against all defendants (including  
12 Longley, Washoe County and Washoe County District Attorney's Office) without  
13 prejudice and without leave to amend. The Fourth Amendment claim in Count III is  
14 dismissed with prejudice. The First Amendment retaliation claim and access to courts  
15 claims in Count III against John Doe are dismissed without prejudice and with leave to  
16 amend. Accordingly, Plaintiff is granted leave to amend the two aforementioned claims  
17 in Count III against John Doe.

18 It is further ordered that that Plaintiff will have thirty (30) days from the date of this  
19 order to file an amended complaint remedying, if possible, the defects identified in the  
20 R&R with respect to the two claims in Count III. The amended complaint must be a  
21 complete document in and of itself, and will supersede the original complaint in its  
22 entirety. Any allegations, parties, or requests for relief from prior papers that are not  
23 carried forward in the amended complaint will no longer be before the court. Plaintiff is  
24 advised that if he does not file an amended complaint within the specified time period,  
25 the Court will dismiss the claims in Count III with prejudice. Plaintiff must clearly title the  
26 amended complaint by placing the words "FIRST AMENDED" immediately above "Civil  
27 Rights Complaint Pursuant to 42 U.S.C. § 1983" on page 1 in the caption, and plaintiff

28 ///

1 must place the case number, 3:17-cv-00482-MMD-VPC, above the words "FIRST  
2 AMENDED COMPLAINT."

3 DATED THIS 18<sup>th</sup> day of July 2018.

4  
5 

6 MIRANDA M. DU  
7 UNITED STATES DISTRICT JUDGE  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28